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No. 784

IN THE

Supreme Court of the United States

October Term, 1963

AIME BURIE, et al.,

—Petitioners,

—against—

OVERSEAS NAVIGATION CORP., SIRENA SHIPPING CO., S.A., PANAMA, and the SS LOMALAND, her engines, boilers, tackle and appurtenances, etc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AIME BURIE et al., petitioners

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Aime Burie, et al., pray that a Writ of Certiorari issue to review the decision (68-69)* and judgment (70) of the United States Court of Appeals for the Second Circuit filed October 29, 1963, affirming a final decree entered in the United States District Court for the Southern District of New York on June 19, 1962 on the opinion of Cooper, J., dismissing the libel.

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* References are to the pages of the record certified by the Court of Appeals.

The Court of Appeals wrote no opinion in affirming the decision of the District Court other than to state:

> "Per Curiam: Judgment for defendants affirmed on the opinion of Judge Cooper, D.C.S.D.N.Y., 205 F. Supp. 182."

The Court of Appeals opinion is not yet reported.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U.S.C.A., Section 1254 (1). The judgment of the Court of Appeals affirming the decree dismissing the libel was entered on October 29, 1963, the appeal having been argued on the 11th day of October, 1963.

Questions Presented

1. Did affirmation of the District Court's decision violate the fundamental Maritime Law principles of fair dealing and protection of seamen from economic exploitation which underlie the theory and practice of "Shipping Articles", as received and practiced in the United States?

2. Did the vessel's continuance of petitioners' service beyond the articles' termination date, absent any peril to the vessel or other emergency conditions, create a renewal of the shipping articles by operation of the law as in any other employment agreement?

3. Since no question of safety or security of the vessel is herein involved, does the decision affirmed herein, reverse the age-old maritime law doctrine that seamen are

"wards of admiralty," and place their interest secondary to the business considerations of the vessel?

4. Was the discharge of petitioners, as accomplished by respondents, a violation of appellants' rights sufficient to hold respondents liable for compensatory damages?

Statement of the Case

This is an action in personam and in rem for:

(i) damages by way of wages lost arising upon the wrongful discharge of the petitioners on May 6, 1958 in violation of their shipping articles as renewed by operation of law, and

(ii) alternatively, to assess respondents with the liquidated damages provided in 46 U.S.C.A. Secs. 575, 578, for shipping "without articles" proscribed in 46 U.S.C.A. Sec. 564, from the period the vessel departed San Pedro, California, to May 6, 1958, when the appellants were discharged at New York City;

(iii) damages for wrongful discharge and impairment of petitioners' immigration status and job potential by respondents' unilateral actions.

Jurisdiction was obtained in personam by service of process on respondents and, in rem, by filing of claim of owner and stipulations for value and costs.

The facts herein are undisputed and may be taken from the decision of the District Court, 205 F. Supp. 182, which also constituted its findings of fact and conclusions of law.

In brief, the vessel, SS Lomaland, flying the Liberian flag, was owned by Sirena Shipping Co., S.A. a Pana-

manian corporation. Overseas Navigation Corp. of New York was the operator of the vessel. It was stipulated that the stock of Sirena Shipping Co., S.A. was entirely owned by United States citizens.

The original articles, were opened on August 18, 1956 at New Orleans, Louisiana. The term of these articles extended 18 months from the opening date. (Exhibit 1, Libellants-Appellants Appendix in the Court below.) The crew, including appellants herein were all aliens of various nationalities who signed said articles on and after their opening date.

On January 23, 1958, three weeks before the expiration date of the Shipping Articles, while the vessel was at Osaka, Japan, respondents, without the knowledge of appellants, contracted to sell the vessel and to deliver it to the purchaser on the East Coast of the United States between April 28 and May 31, 1958. The vessel completed unloading and, on January 29, 1958, departed for Vancouver, Canada where it arrived on February 27, 1958, 10 days after expiration of the Articles.

After a month in and about Vancouver, one week of which was spent in a shipyard for routine maintenance, and the balance in the taking of cargo pursuant to a new charter made subsequent to the termination of appellants' articles, on March 30, 1958 the vessel proceeded to San Pedro, Calif., and then to Providence, R. I., where it arrived on April 29, 1958. The vessel unloaded part of its new cargo at Providence and then departed for New York. The crew had been notified for the first time at Providence that it would be discharged at New York. The vessel arrived at New York on May 4, 1958, discharged its cargo,

and then discharged the crew on May 6, 1958, paying wages at the rate provided in the Articles through that date. It is not disputed that none of the petitioners had at any time requested their discharge after leaving Vancouver or that the petitioners were being discharged because of the sale and the delivery of the vessel at New York pursuant to the said contract previously made.

On April 5, 1958, at San Pedro, Calif., a D-1 immigration status had been established for each petitioner by respondents. On May 2, 1958, at Providence, R. I., without the knowledge or consent of any of petitioners, the respondents requested that the immigration authorities change the D-1 status of appellants to a "voluntary departure" status. Prior to his discharge each of the appellants was given an NE-123 letter, dated May 9, 1958, which provided, in part, that he was

> ". . . . illegally in this country, and subject to deportation, it has been decided that deportation proceedings will be postponed to allow you to depart voluntarily from the United States at your own expense."

This letter was transmitted together with a letter from the Providence immigration authorities dated May 5, 1958 (Exhibits 5 and 2, Libellants-Appellants' Appendix in Court below).

The law of the vessels flag, Liberia, provided that the general maritime law of United States would control. The District Court held that the law applicable, in determining the question of the renewal of the Shipping Articles, was "—United States decisions elucidating general maritime law—.", [and cited] *Corrigan* v. *United States*, 298 F. 610

(S.D.N.Y., 1923); *Shanley* v. *United States*, 294 F. 502 (2nd Cir., 1923); and the text of Norris, The Law of Seamen, Sec. 114. The District Court held that a delay of 2½ months in completing a voyage "might well be attributable to the ordinary vicissitudes and contingencies inherent in maritime trade." 205 F. Supp. 182, 187, despite the fact that the record reflected no vicissitude other than the shipowner's convenience of not discharging appellants and thereupon either making a new agreement or finding a new crew.

Thereafter, the Court stated that an extension of the voyage because of the "fault" of the owner or master would entitle the seamen, upon demand, to be released and paid the wages earned by them up to that time, citing the *Hotspur*, 12 F. Cas. 562 (D.C. Oregon, 1874); and *Hamilton* v. *United States*, 268 F. 15 (4th Cir., 1920), cases. It reasoned therefore, *a fortiori*, that there was no tenable basis for renewal of the articles for another 18 months.

The court failed to note that both the *Corrigan* and *Shanley* cases, *supra*, dealt with extraordinary emergency situations and were, therefore, factually inapposite to the case at bar; and that the *Hotspur* and *Hamilton* cases, *supra*, dealt with conditions of negligence and fault whereby the crew wanted to terminate their articles in violation of law whereas here they desired to continue on articles consistent with universally accepted law which renewed employment agreements which continue beyond their termination date. The reasoning of the District Court, therefore, begs the question in the case at bar.

The Court similarly failed to grapple with the real problems involved in the question of wrongful discharge. Two

intervening factors were left unresolved. The fact that the Port of New York would have been a "final port of discharge" under the Norris definition, The Law of Seamen, Sec. 115, and *Schermacher* v. *Yates*, 57 F. 668, 669 (E.D.-N.Y., 1893), is immaterial if, under their contract and the circumstances, the petitioners were entitled to be discharged at a previous "final port of discharge" i.e. Vancouver, a discharge which would have been in compliance with the articles, and would have avoided the serious damage to the seamen's employment status and immigration complications which succeeded. See *Norris* The Law of Seaman, Sec. 114, where, as here, when "the specified term of the agreement has been reached prior to a port of final discharge, the men are entitled to their discharge—". The unilateral impairment of appellants' status by respondents in order to gain an economic profit at appellants' expense is casually brushed aside by the trial Court.

Reasons for Granting the Writ

The questions submitted herein affect fundamental concepts in the ancient and world-wide maritime profession. They embrace not only commerce and industry but also national security by impairing the confidence of seamen in the application by United States Courts of their protections inherent in the General Maritime Law.

The decision appealed from reverses the declared legislative and judicial attitudes toward seamen which have been in effect since ancient times as reflected in The Laws of Oleron, 30 Fed. Cas. 1171, 1 Pet. Adm. Append. iii; The Laws of Wisbuy, 30 Fed. Cas. 1189, 1 Pet. Adm. Append. 67; The Laws of the Hanse Towns, 30 Fed. Cas. 1195, 1 Pet.

Adm. Append. 93; The Marine Ordinances of Louis XIV, 30 Fed. Cas. 1203, 2 Pet. Adm. Append. iii, and absorbed into English and United States Maritime Law. Two of such principles which are germaine to the issues herein but which were substantially ignored by the Court below set forth that:

> (a) "The purpose of shipping article legislation was to beneficiently impose protection upon seamen who were considered too improvident, naive, or ignorant to safeguard their own interests.", Shipping Articles, N Y L J, 3/23424/1953.
>
> (b) According paternal judicial treatment to seamen in litigation involving wages, health and welfare, Harden v. Gorden, 11 Fed. Cas. No. 6047 (C.C.D. Mass., 1823); Garrett v. Moore-McCormack Co., Inc., 317 U.S. 239 (1942); Farrell v. United States, 336 U.S. 511 (1949); including among other things the right to sue for wrongful discharge. Dahl v. The Amigo, 202 F. Supp. 890, 893; The City of New Orleans, 33 F. 683, 684; Thompson v. The Oakland, Fed. Cas. 13971; The Mary, Fed. Cas. 9186.

General Maritime principles apply to alien seamen as well as United States citizens when the jurisdiction of the United States Courts is invoked and granted, and, in fact, the law of the flag in the instant case requires such application. See, also, *The Belgenland*, 114 U.S. 355 (1855); *Monteiro* v. *Sociedad Maritima San Nicolus*, 280 F. 2d 568 (2d Cir., 1960), Cert. denied, 364 U.S. 915 (1960).

The decision below could only be good law if the facts of this case revealed the emergency type situation which existed in the *Corrigan* case, *supra*, where the vessel had sustained physical damage, repair facilities where unavail-

able, as were replacement personnel; or in the *Shanley* case, *supra*, where the vessel was immobilized in an open and unsafe African port. No such or similar circumstances exist in the case at bar. If precedents are to be cited they must have some verisimilitude to the situation considered. Here was a sound vessel, in safe port with no showing that adequate replacements were not available. Certainly this is not the type situation which may be invoked to impose compulsory added service upon seamen.

Admiralty principles and decisions recognize that only under emergency situations can such compulsion be legally imposed because of the unique calibre of the maritime trade. It was never intended, except for such emergency situations, that the seamen be placed in a less favorable position than his shoreside counterparts. The Courts have recognized that, except where the uniqueness of the maritime profession requires distinction, that shoreside principles apply to maritime labor. *Weisthoff* v. *American-Hawaiian Steamship Company*, 79 F. 2d 124 (2d Cir., 1935); *Penninsular and Occidental S.S. Co.* v. *National Labor Relations Board*, 98 F. 2d 411 (5th Cir. 1938); *Southern S.S. Co.* v. *National Labor Relations Board*, 316 U.S. 31 (1942). The doctrine of master and servant to the effects that employment contracts are renewed by operation of law, if the employee is not discharged at the termination, are universally applicable. 35 Am. Jr. 460; Williston, Law of Contracts, Vol. 1, 3rd Ed. Sec. 90 PP-288-289; 56 Corpus Juris Secundum, Master and Servant Sec. 10; 18 Ruling Case Law, Master and Servant Sec. 48; LRA 1818 C 706 *et seq.*

It is historically factual that the civil law from which is derived the law of Admiralty, embodies the same principles

for the relief demanded by appellants. Benedict on Admiralty, 6th Ed., Vol. 1 p. 2; Browne Civ. and Adm. Law, Secs. 2, 348. See, also, *Romero* v. *International Term. Operating Co.*, 142 F. Supp. 570, 573, aff'd 244 F. 2d 409, rev'd on other grounds, 358 U.S. 354, holding that Spanish Civil Law provides renewal by inference of law, upon the seaman being continued in his berth after his articles expired.

Dr. Lushington, in *The Gananoque*, 167 Eng. Rep. 199, 202, 1 Lush 448, 452, 453 which held the owner liable to the master on the theory of presumptive renewal of an initial employment agreement under the same terms and conditions as originally provided, stated:

> "Prima facie under these circumstances, the presumption of law is that the agreement continued. It is manifest that if a servant is engaged for a fixed period, the law will presume that he remains on the same terms."

The principles expounded in the *Gananoque*, decision, *supra*, have always been the basic law on renewal of maritime agreements. This decision merely reinforced those General Maritime principles covering such situation. Decisions such as the *Corrigan* and *Shanley* cases, *supra*, were directed to special situations. They did not and were not intended to cover the situation existing in the case at bar. No reason appears why the normal considerations applicable to any employment contract, on land or at sea, should not appertain. See, also, *Penninsular* case, *supra*, P 414; *The Hudson*, Fed. Cas. 6831; *The Cornelia Amsden*, Fed. Cas. 3234; *Marsland* v. *Josemite*, 18 F. 331; *Thompson* v. *Faussat*, Fed. Cas. 13954.

In *Herter* v. *Mullen*, 159 N.Y. 28, the court clearly enunciated the general doctrine in applicable cases, which include landlord and tenant and master and servant situations, that a continuance of agreement by the employer which is not involuntary, beyond the termination date, invokes the rule of renewal, stating on pp. 34-35:

> "But whenever the law implies a contract from the act or conduct of a party, the act itself, whatever it may be, must be voluntary. The law does not imply a contract from an act of the party which results from force or coercion of any kind, or which is due to any stress of circumstances which involves peril to his life or that of some member of his family.
>
> * * * * * *
>
> Where the holding over is wrongful or voluntary, and is not unavoidable in the strictest sense, the rule must be permitted to have full application."

The question of wrongful discharge flows from the breach by the respondents of their renewed contracts with the appellants—but it goes even beyond this. It relates also to the failure of respondents to discharge appellants in a "Final Port of Discharge." By definition such a port is one in which the seamen may freely go ashore and, without restraint, seek new and adequate employment. It is immaterial that New York would, under other circumstances, have met such requirements. Respondents by their own actions in unilaterally impairing appellants' immigration status, had removed New York from the category of a final port of discharge for appellants.

In *Stratton* v. *Babbage*, Fed. Cas. N. 13527 at page 225, the court recognized this distinction, stating:

> "The question is whether New Orleans is a port of discharge for free colored seamen. Upon reflection, I am of the opinion that a port in the slave States, where laws of this description prevail, is not a port of discharge for colored seamen. They cannot, in any just sense of the term, be discharged from the vessel. They are not free to go where they please, and to find other voyages."

Had the petitioners been discharged at San Pedro with a 29-day D-2 status, they would have had ample time to seek other adequate employment. The undisputed facts, however, are that on May 6, 1958 they were already in the status of immigration violators under the directives of "voluntary departure" letters. Freedom to freely seek new employment had been effectively removed from them. The decisions below completely ignore this factor.

See, also, *Scharrenberg* v. *Dollar S.S. Co.*, 245 U.S. 122, 125; *United States* v. *Stump*, 292 F. 354, 356-7 which discuss the rights of *bona fide* seamen to enter the United States pursuant to their calling, and the extent of such rights. There can be no doubt that the unilateral actions of respondents substantially impaired and reduced the liberties, rights and opportunities to which the appellants would otherwise have been entitled, to their great damage and detriment.

The foregoing authorities establish that under the circumstances which prevailed in the case at bar the petitioners' shipping articles were renewed by operation of law under the same terms and provisions as initially provided; and that respondents are liable to appellants for the wages lost between May 6, 1958, the date of wrongful discharge and February 17, 1960, the termination date of the renewal

period. The ancient and modern principles of General Maritime Law, applicable herein, provide the basis for this liability. The accepted principles of civil law and common law consistent therewith are apposite only to this conclusion. To artificially engraft exceptions to general rules, which exceptions were formulated to cover unusual and different circumstances, not only violates fundamental concepts of maritime law but, as applied here, also reverses concepts developed over 1,000 years, to the effect that seamen, because of their unique and vulnerable position in a hazardous and lonely profession, must be and are given the exceptional protection of wards of the Court. The instant application instead of giving the added protection characteristically applied to seamen, discriminates against them and places them in an inferior position.

CONCLUSION

The determination of the questions herein is of the utmost importance to the Admiralty bench and bar; these questions affect principles long established in the General Maritime and Labor Law of this country. It affects, the economic potential of American as well as alien seamen. The decision of the court below is in fundamental conflict with the accepted Maritime law, decisions, treatises and philosophy. Affirmance by the Court of Appeals of the District Court decision incorporated a direct reversal of the attitudes expressed by this honorable Court in treating with rights, needs and safeguards of seamen both alien and native. By a basic misapplication of special circumstances which were exceptions to the general rule, the Court below has limited

the general rule itself and made the exceptions a basic principle.

WHEREFORE, petitioners respectfully pray that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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